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BEFORE THE
U.S. DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY
WASHINGTON, D.C.

AIR TRANSPORT ASSOCIATION OF AMERICA:

AGREEMENT RELATING TO LIABILITY LIMITATIONS OF THE WARSAW CONVENTION

Docket OST-96-1607 -53

INTERNATIONAL AIR TRANSPORT ASSOCIATION:

AGREEMENT RELATING TO LIABILITY LIMITATIONS OF THE WARSAW CONVENTION

Docket OST-95-232 -22

COMMENTS OF THE AIR TRANSPORT ASSOCIATION OF AMERICA ON DOT ORDER 96-10-7 AND FOR INTERIM APPROVAL OF AGREEMENT, ANTITRUST IMMUNITY, AND FOR OTHER RELIEF

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On behalf of the signatory carriers listed in Attachment A (the "IPA Parties"), the Air Transport Association of America (ATA) submits these comments on DOT Order 96-10-7 (the "Show Cause Order").[1] Since the November 1, 1996 target date for implementation of its intercarrier agreement is imminent, ATA also requests the Department to grant immediate interim

[1] This filing is submitted on behalf of the IPA Parties. However, the ATA believes, but it cannot represent, that the views expressed here are consistent with the interests of U.S. carriers generally. The views of foreign air carriers, including those affiliated with the ATA, are represented in these dockets by the International Air Transport Association.

approval of, and antitrust immunity for, the ATA's Implementing Provisions Agreement, or IPA, as filed, pursuant to 49 U.S.C. §§ 41308 and 41309 for all current and future signatories to the IPA.

I. SUMMARY OF ARGUMENT

For over thirty years, the United States has been engaged in an effort to modernize the operation of the liability rules of the Warsaw system, and to replace the temporary regime adopted by airlines in the 1966 Montreal Agreement, subsequently made mandatory by DOT regulation. Under the Department's leadership, the airlines have engaged in discussions to adopt, by intercarrier agreement, reforms that are consistent with U.S. policy objectives. The Department now has before it an agreement that will accomplish those objectives. Filed by the ATA, the IPA reflects and implements the intercarrier agreements developed by IATA to waive the outdated limits of the Convention. Although the Show Cause Order proposes a number of conditions in response to the IATA agreements, approval of the IPA would obviate the need for conditions. In fact, many of the more important conditions simply address uncertainties resolved in the IPA itself. Prompt approval of the IPA will therefore meet a substantial part of the Department's policy objectives.

The evolution of the operation of the Convention to meet the changing expectations of passengers must necessarily be a continuing process. It is clear

that many of the reforms recommended by passengers' and victims' groups, no matter how well founded, cannot be addressed by November 1, 1996, the date set for implementing the industry's waiver of the Convention's liability limits. The Show Cause Order raises complex new issues that are likely to require considerable time to resolve. Significant amendments to the liability rules of air carriers beyond those contemplated by the IPA itself will require the resolution of many legal and contractual issues including, but not limited to, questions of insurance coverage. Further, the Show Cause Order proposes conditions not previously noticed by the Department in any of its prior orders in these dockets, and several proposals raise novel and difficult legal issues that cannot be resolved in a proceeding of this nature.

With respect to the proposed interline condition, the ATA recognizes that this issue can be regarded as an integral element of any effort to implement meaningful reforms on a worldwide basis. However, any consideration of this issue must necessarily follow the attainment of an international consensus on the proper implementation of the IATA Intercarrier Agreement on Passenger Liability (IIA). Therefore, the IPA carriers must strongly oppose the imposition of any requirement on interline carriage. First, the proposal effectively constitutes a prohibition on interline relationships with carriers not party to these agreements, which would be extremely disruptive and adverse to the interests of the traveling public given the current lack of international consensus

over these reforms. Further, DOT does not have statutory authority to require one carrier to assume the tort liability of another, and it is uncertain that assumed liability of this nature is insurable. Therefore, its implementation is not possible.

With respect to the order's proposals to amend carrier operating authorities, the ATA member airlines oppose any amendment of their operating authorities other than rulemaking or other regulatory action that will substitute compliance with the IPA, as filed, for compliance with the Montreal Agreement under the Department's existing regulations. Proposed certificate amendments that would have the effect of imposing any other liability requirements on air carriers would have unforeseeable legal and economic consequences for those carriers. Further, several of the proposed conditions and alternatives raised in the order are either inconsistent with Department regulations, beyond the Department's authority to implement, or incapable of implementation by air carriers as a practical matter. The IPA parties specifically reserve their right to an oral evidentiary hearing to examine those implications if the Department proposes any such certificate conditions.

Accordingly, the ATA believes that the public interest requires immediate approval, pendente lite, of the IPA as filed, enabling the carriers to waive the burdensome liability limits of the Convention for passengers without further delay.

II. BACKGROUND

On July 31, 1996, the ATA sought approval of, and antitrust immunity for, an intercarrier agreement known as the Provisions Implementing the IATA Intercarrier Agreement To Be Included in Conditions of Carriage and Tariffs (IPA).[2] In this agreement, the IPA Parties seek to confer on their passengers a significant new benefit: waiver of the unrealistically low liability limit set by the Warsaw Convention[3] ("the Convention") for damage occurring during international air transportation, thereby putting an end to lengthy, expensive litigation.

By Order 96-10-7, the Department proposed to approve, subject to conditions, the IPA and two associated agreements: the IATA Intercarrier Agreement on Passenger Liability (IIA) and the Agreement on Measures to Implement the IATA Intercarrier Agreement (MIA). It also proposed to impose new certificate conditions. These comments reflect the views of the IPA Parties on the Department's proposals.

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[2] The IPA was developed under discussion authority and antitrust immunity granted by Order 95-12-14, which expires November 1, 1996.

[3] Convention for the Unification of Certain Rules Relating to International Transportation by Air, concluded at Warsaw October 12, 1929, 49 Stat. 3000; 2 Bevans 983; 137 L.N.T.S. 11. In 1966, by agreement, the carriers agreed to increase the liability limits, but these limits have also become outdated. This agreement, known as the 1966 Montreal Agreement, remains in force today. Agreement CAB 18900, approved by Order E-23680, May 13, 1966.

III. IMMEDIATE, INTERIM APPROVAL OF THE IPA WOULD ENABLE THE PARTIES TO OFFER IMMEDIATE PUBLIC BENEFITS.

Interim approval, lasting until a final order or other disposition of this proceeding, would preserve the legal positions of all parties to this docket while permitting the IPA Parties to offer the new benefits to passengers immediately. The Department's proposal has raised many new issues that may take some time to resolve. There is no reason to defer until final resolution of all issues the immediate benefits that implementation of the IPA will bring to passengers.

In its Order to Show Cause, the Department tentatively found that approval, with conditions, of the IPA under 49 U.S.C. § 41309(b) would not be adverse to the public interest. Order 96-10-7 at 16. As discussed below, with the exception of one of the five conditions, the conditions the Department proposes to attach to its approval of the IPA itself are consistent with its terms. The only one of these conditions that requires additional consideration is the treatment of interline partners. Interim approval of the IPA would not prejudice in any way the subsequent resolution of the question of interline carriage.

The IPA Parties are prepared to implement the three agreements promptly after approval through tariff revisions. They have had extensive consultations with their insurers and other interested persons in preparation of the IPA. Accordingly, they will confirm the necessary insurance arrangements and prepare the necessary tariff filings. Although the carriers intend to make

immediate efforts to revise the passenger notice now included in its standard ticket stock, it may take as much as a year for current reserves of stock to be depleted. As discussed in their July 31 application, the IPA Parties will phase in the ticket notices as current ticket stock is depleted.

The IPA Parties further request that the Department take appropriate action to ensure that application of the three agreements will serve as full compliance with DOT regulations and orders requiring participation in the 1966 Montreal Agreement.[4]

Interim approval will allow the IPA Parties to continue their efforts to discuss with other carriers the need for uniform application of international passenger liability rules. The IPA Parties believe that it is important to achieve widespread acceptance of the new liability regime. For that reason, paragraph V of the IPA permits a party to encourage other carriers engaged in international air transportation within the meaning of the Convention to become party to the IIA, MIA, and the IPA. Without approval, the IPA Parties will not be able to continue these efforts, since such discussions would present an unacceptable

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[4] Attachment F to ATA Application dated July 31, 1996 lists the applicable DOT regulations. DOT also requires participation in the 1966 Montreal Agreement as a condition of exemption authority and foreign air carrier permits. *See, e.g.,* Orders 93-8-27, Appendix A (U.S. Carrier Standard Exemption Conditions), 93-8-44 (Appendix A to attached foreign air carrier permit), and 95-12-13, Appendix A (Conditions of Authority).

risk of antitrust liability. Moreover, a non-party carrier will be more likely to become a party to an agreement that DOT has approved and immunized.

IV. AGREEMENT APPROVAL CONDITIONS

The IPA Parties observe that proposed approval conditions that address matters already incorporated in the IPA are unnecessary.[5] These proposed conditions include the requirement that carriers apply the waiver of the liability limit systemwide; that carriers waive defenses, or assume strict liability,[6] up to 100,000 SDRs for operations to, from, or through the United States;[7] that carriers agree that the law of the passenger's domicile may govern damages arising from operations to, from, or through the United States;[8] and that there

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[5] As a technical matter, these proposed conditions are conditions on approval of the IIA and MIA, which are met by signatories to the IPA.

[6] The ATA understands that the term "strict liability" as used in Order 95-2-44 and 96-10-7 does not preclude a carrier from avoiding liability under Article 21 of the Convention where the injured person contributed to the damage. This understanding is consistent with the operation of the 1966 Montreal Agreement. *See*, Order E-23680, May 13, 1966.

[7] The application of this condition to interline operations, however, is subject to our comments on the interline condition generally.

[8] In this regard, the IPA parties understand that carriers party to the IIA have effectively agreed to this condition. *See,* IIA, ¶ 1 and Explanatory Note, ¶ 3, in Attachment B to the ATA Application dated July 31, 1996. Furthermore, the Department may be legitimately concerned that U.S. citizens may face limitations of liability under foreign law more onerous than that of the Montreal Agreement. *See, e.g., Barkanic v. CAAC,* 923 F.2d 957 (2nd Cir. 1991).

be no provision precluding U.S. public social insurance agencies from taking advantage of the waivers of the limit and the defense of non-negligence.[9]

The Show Cause Order further proposes to require the ticketing carrier or, if that carrier is not a party, the carrier operating to and from the United States, either to ensure that all interlining carriers are parties to the three agreements, as conditioned, or to itself assume liability for the entire journey. The IPA carriers oppose this unprecedented and unnecessary proposal.[10]

To the extent it may require the ticketing carrier to assume liability for the entire journey, the proposal departs from the established practice that the carrying airline is responsible to the passenger for accidents occurring during its part of the transportation. This practice is based upon principles established in the Convention and in the Multilateral Interline Traffic Agreement (MITA). [11]

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[9] As the Show Cause Order notes, this provision merely restates the intent of carriers party to the three agreements.

[10] The proposal is unnecessary because the carriers have a strong interest in uniform practices for interline services. For this reason, the IPA already permits carriers to discuss with their interline partners the benefits of applying the three agreements. In the IIA and the IPA, carriers may encourage other carriers to become parties. The Department's proposal, however, would require a carrier either to underwrite the liability of its interline partner if it is unable to persuade that partner to apply the agreements, or to terminate its interline relationship altogether. This would run directly counter to an important goal under the Warsaw regime: the uniform, essentially seamless, provision of international passenger air transportation.

[11] The Department approved the provisions of the MITA by Orders 93-9-24 and 95-8-40.

The Convention governs the relationship between passenger and carrier, while the MITA governs the relationship among carriers party to an interline agreement.

Under the Convention, transportation to be performed by successive carriers is deemed to be one undivided transportation. Warsaw Convention, art. 1(3). Where transportation is to be performed by various successive carriers, each carrier is deemed to be party to the contract of transportation insofar as the contract deals with that part of the transportation performed under its supervision. *Id.* at art. 30(1). As a general principle, the passenger can take action only against the carrier who performed the transportation during which the accident occurred. *Id.* at art. 30(2). Thus, the carrying airline bears responsibility toward the passenger.

Under the MITA, the issuing airline is required to issue tickets in accordance with the tariffs and conditions of carriage of the carrying airline (MITA, Article 2.1.1), and may be responsible for indemnifying the carrying airline for liability arising from improper issue. MITA, Article 5.2.1.

The IPA Parties that were instrumental in working with IATA on the development of the IIA and MIA had hoped for a global consensus among major international airlines on the implementation of the waiver of the Convention's liability limits. A global consensus would not only respond to the legitimate concerns of the U.S. government expressed by the Department of

Transportation, but also would preserve the important benefit of uniformity, which is a foundation of the Convention itself. Further, only with carrier consensus would insurers be able to develop the products necessary to the successful implementation of the new regime. Unfortunately, this consensus has not been achieved. Under the circumstances, the Department's proposed interline condition effectively means that either (1) signatory carriers will be prohibited from interlining with non-signatories or (2) signatory carriers would have to become insurers of their interline partners. For different reasons, neither of these options are feasible.

Until there is widespread adherence to the three agreements, action that would result effectively in a prohibition on interline relationships with carriers not party to these agreements would be extremely disruptive to the public. It could seriously disadvantage passengers, who would be forced to purchase new tickets at intermediate points and would lose the jurisdictional benefit of having purchased a ticket in the United States. The Department never imposed such a requirement in connection with the operation of the Montreal Agreement. The Department can only consider the likely effects of such action properly after all other issues are resolved, and there is certainty and international consensus with respect to the proper implementation of the IATA agreements.

The Department has no authority to reassign tort liability among air carriers and it would be inappropriate for it to attempt to do so, since the proposal could have the effect of leaving carriers uninsured for that exposure. The Department's authority in this area is properly limited to ensuring that carriers have insurance adequate to compensate passengers and other tort victims for any losses resulting from the operation or maintenance of their aircraft for which the air carrier may be liable. 49 U.S.C. § 41112 (a). Courts have consistently held that "[t]he Federal Aviation Program . . . makes no provision for its application to tort liability and in fact provides that nothing in the Program shall abridge or alter the remedies now existing at common law or by statute." *Rosdail v. Western Aviation, Inc.,* 297 F. Supp. 681, 684 (D.C. Col. 1969), citing Federal Aviation Act § 1106, now reflected in 49 U.S.C. § 40120(c).[12]

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[12] *Accord, McCord v. Dixie Aviation Corporation*, 450 F.2d 1129, 1131 (10th Cir. 1971); *In re Mexico City Aircrash of October 31, 1979,* 708 F.2d 400, 408 (9th Cir. 1983).

V. CERTIFICATE CONDITIONS

As previously stated, the IPA Parties specifically object to, and reserve their right to request an oral evidentiary hearing on, any proposed amendments to their certificates other than those necessary to implement the IPA as filed.[13]

A. Mandatory Participation. Order 96-10-7 proposes to amend U.S. air carriers' certificate and exemption authority to require them to "universally apply the Agreements as conditioned."[14] The IPA Parties object to this proposed certificate condition. Nevertheless, as reflected in the ATA's application for approval of the IPA, the IPA Parties recognize that the agreement effectively would replace the Montreal Agreement which, by Department regulation, is a mandatory condition of all carrier operating authority. The IPA Parties have requested appropriate regulatory action to allow carriers to implement the IPA consistent with their certificate authority. If the Department accords the carriers the flexibility necessary to implement the various provisions of the IPA under the time-frames set forth in these comments,[15] the IPA carriers would not object to rulemaking or other regulatory action that would have the

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[13] Under 49 U.S.C. § 41110(a)(3), a U.S. carrier is entitled to an oral evidentiary hearing on proposed certificate amendments upon request.

[14] Order 96-10-7 at 10.

[15] The IPA Parties believe they can implement the IPA by January 1, 1997, if the DOT acts promptly. They would also be able to phase out old ticket stock and adopt a new consumer notice on or before January 1, 1998.

effect of substituting the IPA for the Montreal Agreement in the Department's regulations.[16] Accordingly, the IPA Parties do not object, in principle, to a lawfully imposed requirement that merely makes adherence to the three intercarrier agreements, as originally submitted, mandatory as a condition of their certificates.

B. Most Favored Treatment Clause. Under the Show Cause Order, if a carrier has a tariff, a contract of carriage, or similar provisions establishing liability rules under the Convention in other jurisdictions that are more favorable to passengers than those established by the three agreements (as conditioned by the Department's approval order) carriers must also apply those more favorable provisions to all passengers on services to and from the United States. The IPA Parties object to this proposal, which raises many legal and factual issues.

The proposal is for all practical purposes uninsurable since it involves an inherently uncertain risk. First, the determination of which rules are more favorable are too subjective. For example, is it to be determined on a provision-by-provision basis, or on the basis of the entire special contract? Second, how

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[16] Those regulations are listed in Attachment F to the ATA Application, dated July 31, 1996. The IPA Parties would prefer that, if adherence to the IPA is made mandatory, such a change be made by rule-making. The considerations behind the CAB's 1981 decision to employ rule-making processes, including the need to consult a large number of parties having diverse interests, apply with greater force today. *See, e.g.,* 46 Fed. Reg. 52,572 (1981) and 47 Fed. Reg. 25,019 (1982).

and when is this determination to be made? For example, can a court unilaterally change airline liability rules under this proposal? Different national compensation systems may result in special contracts with differing provisions. It is inappropriate to assess the operation of a particular special contract, especially to determine whether its provisions might be considered discriminatory, except within the context of the legal regime in which it is expected to operate. For these reasons, this proposal cannot be practicably implemented.

Finally, the proposal would violate existing Department rules. Under 14 C.F.R. § 221.100(a), a tariff may not incorporate other provisions by reference, as this condition proposes.

C. "Fifth Basis of Jurisdiction." Under the Convention there are four bases of jurisdiction (carrier's domicile, the carrier's principal place of business, the place where the contract was made, and the place of destination), but not including the place of the passenger's domicile.[17] The IPA Parties are well aware of the Department's concern that, unless U.S. victims of air disasters and their families can bring cases before U.S. courts, they cannot be assured of fair compensation. U.S. carriers, of course, are always subject to suit before

[17] In most cases, there are really only two bases of jurisdiction as a practical matter: the carrier's principal place of business (which is usually its domicile) and the place where the contract was made, which is usually also, on a round trip, the place of destination.

U.S. courts, so this specific concern does not apply to them. As the Department is aware, after much debate, the IATA Legal Advisory Subcommittee on Passenger Liability decided not to include such a clause since consensus to include it was not achievable.[18]

Nonetheless, the Department's order would require U.S. carriers to submit to a fifth basis of jurisdiction based on the domicile or permanent residence of the passenger. Order 96-10-7 at 14. In practical effect, the condition would require U.S. carriers to submit to the jurisdiction of foreign courts in the case of a foreign domiciled passenger. However, U.S. courts are the fora of choice in damages litigation under the Convention, and its jurisdictional rules allow actions to be brought in the United States in any case involving a U.S. airline. Thus, the Convention's rules already impose greater burdens on U.S. air carriers and Department action to impose additional requirements would exacerbate, not correct, this imbalance without providing any compensating benefit to passengers.

The IPA Parties were prepared to consider amending the IPA to submit to jurisdiction in the courts where a passenger is domiciled as part of a broader consensus with foreign carriers to implement the IIA consistent with the policy objectives of governments as reflected in recent amendments to the

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[18] Report of Meeting of the IATA Legal Advisory Subcommittee on Passenger Liability, Montreal, April 3, 1996 (Docket OST 95-232).

Convention. However, the IPA Parties object to any certificate amendment to accomplish this result. Since insurers bear the obligation to defend carriers in actions arising under the Convention, the imposition of a new jurisdictional feature on U.S. carriers only is not feasible.

In light of the lack of international consensus, the Department requested comment upon four possible alternatives to this requirement. While the IPA Parties applaud the Department's efforts to consider alternatives to the fifth jurisdiction, these alternatives are not effectively equivalent to action affecting the operation of the Convention's jurisdictional rules. It would be fundamentally inappropriate to attempt to require U.S. carriers to address this issue absent comparable action by all U.S. and foreign air carriers.[19] Therefore, the IPA Parties oppose the adoption of these alternatives as a rationale for requiring U.S. carriers to adopt a fifth basis of jurisdiction.

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[19] We recognize that the governments agreed to reform the outdated bases for jurisdiction contained in the Convention in the 1971 Guatemala Protocol, which was subsequently incorporated in the 1975 Montreal Additional Protocol No. 3. As a matter of policy, this reform would have reflected the jurisdictional norms applicable to other industries, *i.e.,* jurisdiction lies in the customer's domicile if the company has a place of business there. *See, e.g.*, International Convention for the Unification of Certain Rules Relating to Carriage of Passenger Luggage by Sea, Brussels, May 27, 1967, art. 13(1)(c). Thus, there can be no legitimate opposition to the fifth basis of jurisdiction as a matter of principle.

D. Alternatives to Fifth Basis of Jurisdiction. The order proposes several alternative solutions to voluntary submission to the jurisdiction of the courts where the passenger is domiciled.

1. Arbitration. Order 96-10-7 proposes to require carriers operating to and from the United States, including carriers interlining for passengers traveling to and from the United States, to offer an alternative of arbitration on the quantum of damages for U.S. citizen passengers who, under the Convention, cannot seek recoveries in the courts of their domiciles or permanent residence. Although the IPA Parties take no position on this alternative, they note that an arbitration option is not substantially equivalent to an agreement to submit to the fifth basis of jurisdiction.

2. Passenger Notice. Order 96-10-7 proposes to require foreign carriers that do not offer passengers a fifth basis of jurisdiction to notify passengers at the time of ticket sale. The IPA Parties recognize that the Department can require appropriate disclosure to passengers of the operation of the liability rules of the Convention, as implemented by the special contract.

3. Accident Insurance. Order 96-10-7 proposes to require all carriers on a journey from the United States to obtain "a relatively large" accident insurance policy on their passengers, to be offset against any recovery under the Convention, but not refundable. The IPA Parties object to this unprecedented proposal, which would be completely unnecessary for journeys

on carriers party to the IPA. While the terms of the policy's coverage are not precisely described, it is not clear that such a product is even available. Further, the proposal raises a number of legal, social, and economic issues. In effect, the Department would dictate an economic benefit that carriers must provide; in this respect it is no different than a requirement that carriers provide ground transport or in-flight communications facilities. It would be forcing passengers to pay, as part of their fares, for insurance they may neither want nor need. Under deregulation, the Department can no longer prescribe the economic benefits offered by an air carrier or the contents of its tariff. Its power is limited to rejecting a tariff that it finds to be unreasonable or unreasonably discriminatory, after following the procedures of 49 U.S.C. § 41509.

Moreover, this proposal does not fall within the scope of the Department's regulatory responsibilities. As previously discussed, the Department's authority in this area is limited to requiring insurance adequate to meet the carrier's own liabilities. The ATA knows of no basis in either the Convention or other U.S. law that would authorize the Department to take this action.

4. First Carrier on Departure Rule. Order 96-10-7 would require the first carrier on departure from the United States to assume liability for the entire journey to the extent a passenger's recovery might be limited by the

Convention. Order 96-10-7 at 15. The IPA Parties oppose this alternative, which involves the same considerations as the proposal to require the ticketing carrier to underwrite the liability of interlining carriers, discussed above. It differs, however, from that proposal in an important respect. As explained above, in the interline context, the issuing and carrying airlines are in privity with each other, and hence may bear some responsibility to each other and to the passengers under the Convention or the MITA. However, this proposal contemplates the assignment of tort liability to a carrier in a manner inconsistent with the Convention's rules, described above. It, in effect, proposes to sanction one airline for the lack of action of another. The IPA Parties vigorously object to this proposal. It is clearly beyond the statutory authority of the Department, and is unlawful.

VI. RELIEF REQUESTED

The IPA Parties respectfully request that the Department grant immediate interim approval of, and antitrust immunity for, the ATA's Implementing Provisions Agreement, as filed, pursuant to 49 U.S.C. §§ 41308 and 41309 for all current and future signatories to the IPA. The IPA Parties further request that the Department determine that participation in the IPA will effect

compliance with Department regulations and the conditions of airline economic authority requiring participation in the 1966 Montreal Agreement. Finally, the IPA Parties object at this time to any other action by the Department to amend their certificates or other authority.

Respectfully submitted,

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Attachment A

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* Carrier has signed since July 31, 1996

CERTIFICATE OF SERVICE

I hereby certify that on this date I served a copy of the Comments of the Air Transport Association of America on DOT Order 96-10-7 and For Interim Approval of Agreement, Antitrust Immunity, and for Other Relief by fax or first class mail, postage prepaid, on the following:

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